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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 614

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In the Matter of
STANDARD COAL MINING & CONVERTERS CORPORATION, Bankrupt

RALPH M. BROCK and HENRY E. BECKER,
Petitioners,

vs.

ROBERT C. SOLOMON, Trustee, etc.,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, Ralph M. Brock, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit, entered on November 16, 1949, affirming the judgment of the United States District Court for the Southern District of Illinois, Southern Division.

Your petitioner is further aggrieved by the order of the United States Court of Appeals for the 7th Circuit, denying his petition for a rehearing in this cause entered on January 19, 1950.

Opinion Below.

The opinion of the United States Court of Appeals has not been officially reported, but may be found in the record.

Jurisdiction.

The judgment of the United States Court of Appeals for the 7th Circuit was entered on November 16, 1949. The order of the United States Court of Appeals, denying the petition for rehearing was entered on January 19, 1950. The jurisdiction of this Court is invoked under Section 1254 of the Judiciary Procedure Act, Title 28 USCA, section 1254, effective September 1, 1948.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

On June 25, 1947, the Standard Coal Mining & Converters Corporation, of which your petitioner was President, was adjudicated a bankrupt by the United States District Court for the Southern District of Illinois, Southern Division.

Thereafter, on August 31, 1948, an order was entered in the United States District Court for the Southern District of Illinois, Southern Division, by the Honorable Basil H. Coutrakon, Referee in Bankruptcy, finding that your petitioner had in his possession on the day of the filing of the petition in bankruptcy the sum of $17,500.00, belonging to the bankrupt, and ordering him to turn over such sum within ten days from the service of a copy of the order. A similar order was directed against Henry E. Becker.

On March 28, 1948, a hearing was had in the United States District Court for the Southern District of Illinois, Southern Division, before the Honorable Charles G. Briggle, one of the judges of said Court, on the Referee's Certificate of Contempt. An order of committment was entered on that day against petitioner, placing him in the custody of the Attorney General of the United States for confinement (R. 68, 69, 70).

This order found that petitioner had in his possession on August 31, 1948 the sum of $17,500.00, belonging to the bankrupt estate and had wilfully and in contempt of Court, failed and refused to pay such sum to the Trustee in bankruptcy. Petitioner was taken into custody on March 28, 1949, and incarcerated in the City Jail at Springfield, Illinois, where he remained until June 15, 1949, when he was released on bond approved by the United States Court of Appeals for the 7th Circuit.

Evidence.

At the hearing before the District Court, your petitioner testified at some length that he was unable to comply with the turn-over order, either at the time it was entered or at the time of the hearing (R. 41, 42, 43).

He was not permitted to show that the money he is accused of withholding was spent, nor was he allowed to testify as to the purposes for which it was withdrawn by him and used (R. 41).

Matters Urged in the Court of Appeals.

Two chief points were raised in the Court of Appeals—first, there was no evidence that petitioner had $17,500.00 belonging to the bankrupt estate on March 28, 1949, but there was evidence showing that he did not have such money or any part thereof, and, second, that the District Court did not take into consideration his present ability to comply with the order.

Questions Presented.

Whether the Court of Appeals, although deciding that inability to comply with the turn-over order of the District Court would constitute a defense in a contempt proceeding, erred in refusing to direct the District Court to inquire into petitioner's present ability to turn over the sum of $17,500.00, thereby rendering ineffective its opinion.

Reasons for Granting the Writ.

The decision of the Court of Appeals in this case conflicts with decisions of this Court. It has served completely to emasculate effective relief in cases of the character of this case.

The Court of Appeals recognized that the District Court had committed error. This is conclusively shown in the final two paragraphs of its opinion:

"We are also admonished by the Supreme Court in the *Maggio* case, *supra,* that the proper enforcement of turn-over orders can be resolved only by the good judgment of the trial court, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which would bring discredit to the judicial process.

"At the hearing herein, the trial court seemed reluctant to admit testimony as to what Brock and Becker did with the funds withdrawn from the bank accounts of bankrupt, apparently on the theory that the turn-over order was *res adjudicata* and could not be collaterally attacked. We agree that such order was *res adjudicata,* but we are of the view that such testimony was relevant and material. If the funds withdrawn from the bank accounts of the bankrupt are still intact and in the possession of or obtainable by the appellants, the court would be justified in keeping them in jail until they complied with the turn-over order. However, if proof can be made that said funds are in truth no longer available, this fact would have an important relation to appellants' present ability to comply with the turn-over order, and determine whether the terms of the order of commitment for contempt that each appellant be committed to jail "until he shall purge himself of his said contempt" should be modified, or the commitment vacated, and Brock and Becker released, but until such time, the order shall stand and it is hereby."

Despite this language, the Court of Appeals affirmed the decision of the District Court.

Prior to the decision of this Court in the case of *Maggio* v. *Zeitz*, 333 U. S. 56, there might have been some question in the minds of judges and lawyers as to how a contemnor, unable to comply with a turnover order could purge himself of contempt without spending the rest of his life in jail. It seems quite apparent that by the decision, the Court undertook to clarify the law applicable to cases of this nature and to insure that no further injustice be inflicted upon persons finding themselves in a similar situation.

The facts in *Maggio* v. *Zeitz* are almost identical with those involved here. There the alleged abstraction by the bankrupt also took place several months before bankruptcy and over a year before the turnover order was issued.

There, as here, the only evidence that the goods were in Maggio's possession at the time of the contempt proceedings was the proof of his one time possession and a "presumption", because of the absence of a credible explanation of his disposition of the goods, that he continued in possession of them. There, as here, both the District Court and the Court of Appeals apparently adhered to the "presumption" by affirming the turn-over order and considering it "*res judicata* and the injustice beyond reach on review of the contempt order." (*Maggio* v. *Zeitz*, 333 U. S. 56, 60.)

In the instant case, the District Court took into consideration the action of your petitioner only as of the date of the bankruptcy, and the Court of Appeals, by its refusal to direct the District Court to hear evidence as to the disposition of the funds and the present inability of petitioner to comply with the order has, in effect, ignored the decision of this Court in *Maggio* v. *Zeitz*.

The evidence at the hearing here clearly shows that the District Court did exactly what the Supreme Court con-

demned. The evidence conclusively rebutted any presumption of present possession of the funds.

If this matter comes up again, under the present decision of the Court of Appeals, the District Court "must thus affirm orders, which first direct a bankrupt 'to do an impossibility, and then punish him for refusal to perform it • • • '". (*Maggio* v. *Zeitz*, 333 U. S. 56, 69.)

CONCLUSION.

Your petitioner has already served almost three months in jail. Under the mandate of the Court of Appeals, he will be incarcerated for an indefinite term, being unable to purge himself of the contempt in a manner satisfactory to the District Court. If your petitioner has committed a crime, the Government or the State of Illinois is not precluded from proceeding with its prosecution in a legal manner. As the matter now stands, however, he faces the prospect of an indefinite stay in jail, without hope of being able to help himself.

The decision by the Court of Appeals is one of general importance, and is in direct conflict with decisions of the Supreme Court. It is respectfully submitted that the decision of the Court of Appeals, for the reasons we have suggested, clearly merits review by this Court.

Respectfully submitted,

LEO L. DONAHOE,
Attorney for Petitioner,
Ralph M. Brock.